BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLONA JACKSON	)	
Claimant	)	
	)	
VS.	)	
	)	
LAKEPOINT NURSING & REHAB	)	
Respondent	)	Docket No. 1,056,279
	)	
AND	)	
	)	
ACCIDENT FUND INS. CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 2, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment with respondent on May 20, 2011. Accordingly, the ALJ designated Dr. Pat Do as claimant's treating physician, all medical was ordered paid, and temporary total disability payments were ordered paid beginning May 23, 2011, until claimant is released or provided accommodated employment. The medical expense of Dr. Pedro Murati was ordered paid as unauthorized medical.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 2, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file. During the August 2, 2011, Preliminary Hearing, the parties stipulated to a "date of accident" of May 20, 2011, for claimant's alleged bilateral repetitive use injuries.[1]

[1] P.H. Trans. at 4-5, 8.

ISSUES

Respondent contends claimant's upper extremity complaints are the result of arthritis and did not arise out of and in the course of her employment. Further, respondent contends claimant did not provide it with timely notice of any injuries to her bilateral upper extremities other than to her right thumb. Therefore, respondent asks that the ALJ's Order be reversed.

Claimant argues that the ALJ correctly found Dr. Do's findings and opinions more credible than those of Dr. Benjamin Norman. Claimant further asserts the evidence shows that her bilateral upper extremity injuries arose out of and in the course of her employment with respondent. In regard to respondent's argument concerning timely notice, claimant argues that notice was not raised as an issue before the ALJ and, therefore, the Board has no jurisdiction over that issue.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury or repetitive trauma injuries that arose out of and in the course of her employment? If so, is claimant's current need for medical treatment to her bilateral upper extremities caused by her accidental injury or repetitive trauma while working for respondent?

(2) Does the Board have jurisdiction over the issue of timely notice since it was not raised before the ALJ? If so, did claimant give respondent timely notice of her injury by accident or repetitive trauma?

FINDINGS OF FACT

Claimant began working for respondent, a nursing home facility, in June 2009 as a dietary aide and dishwasher. Her job required her to wash dishes, set up tables, set up drinks, put dishes away, and put stock away. She used her hands constantly in her job. Claimant started noticing pain for a couple weeks in May 2011. On May 20, 2011, the pain became worse, especially in the area of her right thumb and wrist. She then went to her boss, the manager at the nursing home, and reported the problem with her right hand. She filled out an Employee's Incident Report in which she indicated she was washing dishes, picking up dishes and turning them over when her right thumb started to hurt.

Respondent referred claimant to Dr. Benjamin Norman, and she saw him that same day, May 20, 2011. Dr. Norman's notes indicate claimant complained of increasing discomfort in her right hand. He noted claimant's fingers were swollen and any motion of her hand was uncomfortable. Claimant said she had intolerable discomfort when trying to wipe tables. Claimant told Dr. Norman she had no trauma at work and there was nothing different in her equipment or hours at work that might have precipitated the problem. An x-ray of the hand was negative for fracture, dislocation or other bony abnormality.

Dr. Norman diagnosed claimant with acute inflammatory arthritis and opined that this was not a work related situation. Dr. Norman issued claimant light duty restrictions, which claimant took back to her boss. Claimant said she was told by her boss not to return to work unless a doctor released her with no restrictions.

Claimant saw Dr. Pedro Murati on June 8, 2011, at the request of her attorney. Her chief complaints were throbbing, burning and stabbing pain starting at the bottom of the right thumb going up to the wrist, trouble gripping and lifting with her right hand, and occasional left hand pain. Claimant testified the pain in her left hand was a little, short pain. After examining claimant, Dr. Murati diagnosed her with right de Quervain's syndrome and bilateral carpal tunnel syndrome. Dr. Murati opined: "[I]t is my opinion under all reasonable medical certainty that her bilateral carpal tunnel syndrome and right de Quervain's syndrome are the direct result of prevailing factor of her repetitive activities at [respondent] under the new workers' compensation act."[2] Dr. Murati issued temporary restrictions of no climbing ladders, repetitive grasping or grabbing, or working above chest or shoulder level. She could occasionally use repetitive hand controls. Her lifting, carrying, pushing and pulling was limited to 20 pounds and 10 pounds rarely. She was not to use hooks, knives or vibratory tools. Keyboarding was limited, and she was to use wrist splints.

On June 9, 2011, claimant filed a Form K-WC E-1 Application for Hearing alleging a series of accidents "up to and including 5/20/11" from "repetitive use" resulting in injuries to her "bilateral upper extremities and all exacerbations thereto."

Pursuant to an order of the ALJ,[3] claimant was seen by Dr. Pat Do for an independent medical examination. Claimant complained of bilateral wrist pain with the right being worse than the left. She told Dr. Do she had occasional numbness and tingling in her right hand but not in her left hand. After taking a history and examining claimant, Dr. Do stated that claimant did not have arthritis. He diagnosed her with bilateral wrist first dorsal compartment tenosynovitis, right worse than left, and possible carpal tunnel syndrome on the right. He recommended work restrictions limiting her gripping, grasping and pinching, and limiting doing dishes to 34 to 66 percent of the day. Dr. Do stated that claimant fit into the category of repetitive trauma and her work activities are the prevailing factor of her conditions.

In 2006, claimant suffered a repetitive injury to her left wrist while working for another company where she did the same sort of work she was performing for respondent. Dr. David Hufford performed first dorsal compartment release surgery on claimant's left wrist for acute tenosynovitis in March 2007. She was released to return to full duty on June

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[2] P.H. Trans., Cl. Ex. 1 at 4.

[3] The June 23, 2011, Order appointed Dr. Do to perform an independent medical examination and, in addition, provided that in the event Dr. Do found claimant's injuries to be causally related to her work activities, then Dr. Do was authorized to provide treatment. That Order was not appealed to the Board.

19, 2007. She told Dr. Hufford she had minimal to no pain in her left wrist. She testified she returned to work after that and had no more trouble with her left arm at any time until she started noticing problems in 2011.

PRINCIPLES OF LAW

K.S.A. 44-508 (2011) states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
>
> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.
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> . . . .
>
> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995)

K.S.A. 44-520 (2011) states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

Claimant suffered repetitive traumas to her bilateral upper extremities as a result of performing her regular job duties while working for respondent. As claimant's injuries developed over a period of time which exceeded a single work shift, her injuries do not fall within the definition of an accident. The injuries arose out of and in the course of claimant's employment. They are not the result of a personal risk or the normal activities of day-to-day living. Dr. Do. stated:

> Utilizing the guideline sent to me on an injury by repetitive trauma, I see her fitting into that category under repetitive trauma. She certainly does not have underlying arthritis or rheumatoid arthritis that would predispose her. I think her work activities are the prevailing factor. She in the normal day to day activities would not be doing dishes for almost an entire nursing home breakfast and lunch working from 7 a.m. to 3 p.m. and she certainly does not have any preexisting issues that I can see such as degenerative arthritis. She is only 33 years old and there is nothing in the medical records that showed preexisting arthritis to the wrist. She did have an acute tenosynovitis for her left wrist for which she was treated, rated, and released in 2007 with minimal to no pain for the left wrist since her recent injury.[7]

This increased risk from her employment is the prevailing factor in causing the repetitive trauma injuries.

Notice was not an issue presented to the ALJ at the preliminary hearing, and notice was not addressed by the ALJ in his August 2, 2011, Order. On an appeal from a preliminary hearing Order, the Board's jurisdiction is limited to review of the issues raised to and decided by the ALJ. Accordingly, the Board is without jurisdiction to consider the questions concerning notice which have been raised for the first time on appeal.[8]

CONCLUSION

(1) Claimant's bilateral upper extremity injuries arose out of and in the course of her employment with respondent.

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[6] K.S.A. 2010 Supp. 44-555c(k).

[7] Dr. Pat Do's independent medical report dated July 15, 2011, filed with Division on July 25, 2011, at 2.

[8] See K.S.A. 44-555c(a).

(2) The Board is without jurisdiction to address the issue of notice at this time.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 2, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2011.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge